UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

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In re:

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

as representative of

THE COMMONWEALTH OF PUERTO RICO, et al.,

Debtors.[1]

PROMESA
Title III

Case No. 17-3283 (LTS)
(Jointly Administered)

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THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Plaintiff,

v.

HON. WANDA VÁSQUEZ GARCED and THE PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY,

Defendants.

Adv. Proc. No. 19-00393-LTS
in Case No. 17-3283 (LTS)

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[1] The Debtors in these Title III Cases, along with each Debtor's respective Title III case number and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17 BK 3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17 BK 3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17 BK 3566-LTS) (Last Four Digits of Federal Tax ID: 9686); and (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17 BK 4780-LTS) (Last Four Digits of Federal Tax ID: 3747) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

OPINION AND ORDER DENYING
DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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LAURA TAYLOR SWAIN, United States District Judge

The question of whether and to what extent the Financial Oversight and Management Board for Puerto Rico (the "Oversight Board") can take action to challenge or constrain the ability of other officials of the Commonwealth of Puerto Rico (the "Commonwealth") to implement and enforce fiscal policy decisions that are arguably contrary to a certified fiscal plan or otherwise inconsistent with the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") is again before the Court. In May of this year, Puerto Rico's legislature passed, and the former governor signed, a statute that seeks to address the financial distress of Puerto Rico's municipalities by eliminating their obligation, upon which Puerto Rico's current certified fiscal plan is premised, to reimburse the Commonwealth for the cost of current pension payments to their retired former employees. The Commonwealth has also enacted additional measures providing for spending outside of the fiscal plan. The Oversight Board commenced this adversary proceeding seeking to nullify these measures and enjoin their ongoing implementation.

Now before the Court is the *Defendants' Motion to Dismiss Plaintiff's Complaint Dated July 3, 2019 Under Fed. R. Civ. P. Rules 12(b)(1) and 12(b)(6)* (Docket Entry No. 17 in Adversary Proceeding No. 19-00393, the "Motion"),[2] filed by then-Governor Ricardo Antonio Rosselló Nevares (the "Governor"[3]), acting in his official capacity, and the Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF" and, collectively with the Governor, the "Defendants"). The Court heard argument on the Motion on August 15, 2019, and has

[2] All docket entry references herein are to entries in Adversary Proceeding No. 19-00393, unless otherwise specified.

[3] As used in this Opinion and Order, the term "Governor" also refers to the successors in office of former Governor Rosselló, as required by temporal context.

considered carefully all of the arguments and submissions made in connection with the Motion.[4] The Court has subject matter jurisdiction of this action pursuant to 48 U.S.C. § 2166. For the following reasons, the Court finds that the Oversight Board has stated viable claims under PROMESA, and the motion to dismiss the Oversight Board's adversary complaint is denied.

I.

BACKGROUND

Except as otherwise indicated, the following recitation of facts is drawn from *The Financial Oversight and Management Board for Puerto Rico's Verified Complaint for Declaratory and Injunctive Relief Against the Governor of Puerto Rico and the Puerto Rico Fiscal Agency and Financial Advisory Authority* (Docket Entry No. 1, the "Complaint"), filed on July 3, 2019, by the Oversight Board, for itself and as representative of the Commonwealth.

On June 30, 2016, to address the ongoing fiscal emergency in Puerto Rico created in part by a "combination of severe economic decline, and, at times, accumulated operating deficits, lack of financial transparency, management inefficiencies, and excessive borrowing," the United States Congress passed, and the President signed into law, PROMESA.[5] 48 U.S.C.A. § 2194(m)(1) (West 2017). PROMESA created the Oversight Board as "an entity within the territorial government" of Puerto Rico and tasked the Oversight Board with developing "a

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[4] In addition to the Motion, the Court has received and reviewed *The Financial Oversight and Management Board for Puerto Rico's Opposition to Defendants' Motion to Dismiss* (Docket Entry No. 34, the "Opposition"), the *Defendants' Reply Memorandum of Law in Further Support of Motion to Dismiss Plaintiff's Complaint Dated July 3, 2019 Under Fed. R. Civ. P. Rules 12(b)(1) and 12(b)(6)* (Docket Entry No. 42, the "Reply"), and the *Amicus Curiae Brief of the Autonomous Municipality of San Juan* (Docket Entry No. 38).

[5] PROMESA is codified at 48 U.S.C. § 2101 et seq. References to "PROMESA" section numbers in the remainder of this Opinion and Order are to the uncodified version of the legislation.

method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets." 48 U.S.C.A. §§ 2121(a), (c)(1) (West 2017). In aid of that purpose, PROMESA empowers the Oversight Board to, among other things, certify the fiscal plans and budgets of the Commonwealth and its instrumentalities, override Commonwealth executive and legislative actions that are inconsistent with certified fiscal plans and budgets, review new legislative acts, and commence a bankruptcy-type proceeding in federal court on behalf of the Commonwealth or its instrumentalities. Id. §§ 2141–2152, 2175(a). On May 3, 2017, the Oversight Board commenced a debt adjustment proceeding on behalf of the Commonwealth by filing a petition in this Court under Title III of PROMESA.[6] (See Docket Entry No. 1 in Case No. 17-03283.)

A. PayGo

On March 13, 2017, the Oversight Board certified a fiscal plan that incorporated several pension reforms, including the adoption of a "Pay as you Go" ("PayGo") system. (Compl. ¶ 35.) Under PayGo, the Commonwealth and other subject employers, including municipalities, pay pension and other retirement benefits as they come due to retirees, rather than pre-fund those benefits through an investment trust. (Id.)

On August 23, 2017, the Legislature of the Commonwealth (the "Legislature") passed Act 106-2017, titled the "Act to Guarantee the Payment of Pension Benefits to our Retirees and to Establish a New Defined Contribution Plan for Public Employees" ("Act 106," Compl. Ex. 11). (Compl. ¶ 36.) Act 106 recognized the Commonwealth's unprecedented fiscal and social crisis, acknowledged the "serious fiscal emergency" faced by the Commonwealth's public retirement systems, and directed the Commonwealth to pay all pension costs. (Id.) Act 106 required municipalities, public corporations, and other public employer entities to fund

[6] See 48 U.S.C. §§ 2164, 2172-2174.

pension obligations for their own retired employees through monthly payments to the Commonwealth in the amount of benefits paid to each of their respective retirees (the "PayGo Fee"), and recognized that the Commonwealth would assume the obligation of municipalities, public corporations, and other covered employers to pay their share of pension costs if such entities failed to fulfill their funding obligations. (Id. ¶ 37.)

On May 9, 2019, the Oversight Board certified the most recent fiscal plan for the Commonwealth (the "2019 Fiscal Plan," Compl. Ex. 3), which acknowledges the more than $50 billion in pension liabilities owed by the Commonwealth and its instrumentalities, and which specifically includes comprehensive pension reform as a necessary fiscal measure. (Compl. ¶ 39.) The 2019 Fiscal Plan further assumes that the allocation of financial responsibilities set forth in Act 106, including the Commonwealth's receipt of PayGo Fees from municipalities, will remain in effect. (Id.) The assumptions, projections, and analysis contained in the 2019 Fiscal Plan cover a five-year period. (See Compl. Ex. 3.)

B. Law 29

On May 13, 2019, the Legislature passed Act 29, titled the "Law to Reduce the Administrative Burdens of Municipalities" ("Law 29," Compl. Ex. 2). The stated purpose of Law 29 is to reduce the "administrative burden of municipalities in relation to payments made [by municipalities] in respect of the health plan of the Government of Puerto Rico and the [PayGo] system." (Law 29 at Art. 2.) On May 17, 2019, the Oversight Board advised the Governor, the President of the Senate of Puerto Rico, and the Speaker of the House of Representatives of Puerto Rico that the potential fiscal impact of Law 29 would be approximately $311 million for fiscal year 2020, and $1.7 billion through fiscal year 2024. (Compl. ¶ 40.) Based on these estimates, the Oversight Board further advised that Law 29 is

"not compliant with the [2019 Fiscal Plan], which includes municipalities' full payment of their obligations to [the Puerto Rico Health Insurance Administration ("ASES")] and PayGo." (Id.)

On May 17, 2019, the Governor signed Senate Bill 1258, thereby enacting Law 29. (Id. ¶ 41.) Law 29 expressly eliminates the obligation of municipalities to contribute to ASES and PayGo, providing that the Municipal Income Collection System ("CRIM," by its Spanish acronym) "shall withhold . . . fifty percent (50%) of the amount that municipalities would have the obligation to disburse to ASES, based on the amount invoiced for fiscal year 2015-2016, and up to ninety percent (90%) of the amount that municipalities would have to pay for [PayGo], based on the amount invoiced for fiscal year 2017-2018, to be distributed to municipalities." (Law 29 at Stmt. of Purpose.)

Section 204(a) of PROMESA, codified at 48 U.S.C. § 2144(a), requires the Governor to submit new laws to the Oversight Board with documentation, prepared by a government entity with budget and financial management expertise, comprising (a) a "formal estimate" of the expenditure and revenue impact of the new legislation, and (b) a certification as to whether the new legislation is significantly inconsistent with the governing fiscal plan. On June 3, 2019, the Governor, AAFAF, and the Puerto Rico Office of Management and Budget submitted a copy of Law 29 and an accompanying "Compliance Certificate of New Joint Resolution Pursuant to 48 U.S.C. § 2144[(a)](2)(B)" (the "Certificate," Compl. Ex. 12) to the Oversight Board. (Compl. ¶ 43.) The Certificate provides the following "estimate of impact" of Law 29 on expenditures and revenues:

> [Law] 29 has an impact on the budget of [ASES] of approximately $119.7 million for Fiscal Year 2020, and $161.6 million for each fiscal year from 2021 to 2024.
>
> As for the [PayGo] system, [Law] 29 has an impact of approximately $166 million for Fiscal Year 2020. An actuarial

> study has been requested to determine the impact on expenditures for subsequent fiscal years.
>
> Notwithstanding the foregoing, said impact will not be incremental, because these expenditures will be covered using budgeted resources and other measures in response to possible additional federal funding in Fiscal Year 2020, and are already required expenditures under the [PayGo] framework set forth in [Act 106].

(Cert. at 2.) The Certificate also includes a determination that Law 29 "is not significantly inconsistent with the [2019 Fiscal Plan]," and concludes that Law 29 "complies with the requirements set forth in 48 U.S.C. § 2144[(a)](2)(B)." (Id.)

On June 12, 2019, the Oversight Board sent a notification pursuant to PROMESA Section 204(a)(3)(A) (the "Notification," Compl. Ex. 5) to the Governor, the President of the Senate of Puerto Rico, and the Speaker of the House of Representatives of Puerto Rico, stating that the Certificate failed to include a formal estimate of the effect, if any, that Law 29 "will have on expenditures and revenues." (Compl. ¶ 49.) The Oversight Board also stated in the Notification that it "considers [Law 29] to be significantly inconsistent with the [2019 Fiscal Plan]," and directed the recipients of the Notification to provide the missing estimate within seven business days and an amended compliance certification reflecting such estimate. (Notification at 2.) The Oversight Board provided the following guidance for the revised estimate:

> In order for the formal estimate required by Section 204(a)(2)(A) to be complete, it must (i) identify specifically the "budgeted resources" and "other measures" that will purportedly cover the additional hundreds of millions of dollars associated with [Law] 29 for the duration of the [2019 Fiscal Plan], (ii) explain why the use of such "budgeted resources" and "other measures" is consistent with the [2019 Fiscal Plan], (iii) identify specifically the "possible additional federal funding in Fiscal Year 2020," and (iv) explain its relevance to the conclusion of the [Certificate] in light of the fact that it is only "possible" and limited to just Fiscal Year 2020.

(Id.) Defendants did not respond to the Notification. (Compl. ¶ 51.)

C. The Joint Resolutions

PROMESA Section 204(c), which is codified as 48 U.S.C. § 2144(c), provides for the submission of requests to the Oversight Board for reprogramming of budgeted funds, and provides, inter alia, that no reprogramming shall be adopted or carried out until "the Oversight Board has provided the Legislature with an analysis that certifies such reprogramming will not be inconsistent with the Fiscal Plan and Budget." 48 U.S.C.A § 2144(c)(2) (West 2017). Between January 4, 2018, and July 27, 2018, the Legislature passed twenty-three joint resolutions that Plaintiff contends reprogram funds (the "Joint Resolutions," Compl. Exs. 15-37), without first requesting that the Oversight Board provide the Legislature with an analysis that certifies such reprogramming will not be inconsistent with the relevant fiscal plan and budget. (Compl. ¶ 52.) The Joint Resolutions appropriate funds for expenditures not included in either the Oversight Board-certified budgets for Fiscal Year 2019 (the "2019 Budget," Compl. Ex. 9) or Fiscal Year 2020 (the "2020 Budget," Compl. Ex. 10 and, together with the 2019 Budget, the "Budgets").[7] (Compl. ¶ 52.) The Oversight Board sent letters to the Governor on February 26, 2019, May 5, 2019, and June 29, 2019 (see Compl. Exs. 8, 13, and 14), asserting that he had not complied with Section 204(c) of PROMESA. (Compl. ¶ 53.)

D. Other Alleged PROMESA Violations

On December 3, 2018, January 14, 2019, and June 19, 2019, the Oversight Board sent letters to the Governor in connection with the Governor's alleged violations of Section 203

[7] Each Joint Resolution at issue is described in detail in Paragraph 52 of the Complaint. The Oversight Board alleges that each resolution apportions a certain monetary amount, reprogramming previously-allocated funds in contravention of the 2019 Fiscal Plan and Budgets.

of PROMESA (see Compl. Exs. 6, 8, and 38).[8] (Compl. ¶ 54.) Section 203(a) of PROMESA, which is codified as 48 U.S.C. § 2143(a), requires the Governor to submit quarterly reports to the Oversight Board comparing actual revenues and expenditures to those contemplated by the applicable budget. The Oversight Board alleges that the Governor has "repeatedly failed to comply with § 203(a) by submitting § 203(a) reports late, incomplete, or not submitting reports at all." (Compl. ¶ 55.) Specifically, the Governor has yet to submit complete third quarter "budget to actual reports" for the University of Puerto Rico ("UPR") and the Puerto Rico Highways and Transportation Authority ("HTA"), despite an April 15, 2019 deadline, and has further failed to submit "budget to actual reports" for the Puerto Rico Electric Power Authority, UPR, and HTA for Fiscal Year 2018, despite a June 30, 2019 deadline. (Id.) Additionally, the Governor has failed to submit Section 204(a) certificates for fifty-eight new laws (the "New Laws") and fifty-six joint resolutions (the "Non-Certified Joint Resolutions"). (Id. ¶ 11.)

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On July 3, 2019, the Oversight Board filed the Complaint, pleading the following eight counts. In Count I, the Oversight Board seeks declarations that the Governor has failed to comply with PROMESA Section 204(a)(1), that the Oversight Board has the authority under PROMESA Section 204(a)(5) to prevent enforcement of a law to ensure the law will not

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[8] Section 203 of PROMESA generally governs the effect of noncompliance with the certified budget, including: (i) the submission of budget-related reports by the Governor to the Oversight Board, (ii) the process by which the Oversight Board may take initial action in the event of its determination that the Governor's budget-related reports are not consistent with the certified budget, (iii) the process by which the Oversight Board may certify an inconsistency between the Governor's budget-related reports and a certified budget and certify a correction to such an inconsistency, (iv) the process by which the Oversight Board, after determining that the Governor and/or the Legislature have failed to correct an inconsistency, may effectuate budget reductions, and (v) the Oversight Board's ability to terminate such budget reductions. See 48 U.S.C. § 2143(a)-(e).

adversely affect compliance with the 2019 Fiscal Plan, and that, due to Defendants' failure to properly certify Law 29, Defendants "are enjoined from implementing and enforcing Law 29 and the law shall be deemed a nullity." (Compl. ¶ 61.) In Count II, and pursuant to both Sections 104(k) and 207 of PROMESA, the Oversight Board seeks declarations that Law 29 is unenforceable and of no effect, and that due to Defendants' violation of PROMESA Section 207, Defendants "are enjoined from implementing and enforcing Law 29 and the law shall be deemed a nullity." (Id. ¶ 65.) In Counts III and V, the Oversight Board seeks mandatory permanent injunctions prohibiting Defendants from implementing and enforcing Law 29 and compelling the Governor to submit compliant Section 204(a) certifications for the New Laws and Non-Certified Joint Resolutions. (Id. ¶¶ 76, 91.) In Count IV, the Oversight Board seeks a declaration that Law 29 and the Joint Resolutions violate PROMESA Section 204(c), and therefore are unenforceable and of no effect. (Id. ¶ 81.) In Counts VI and VII, the Oversight Board seeks declarations that Law 29 and the Joint Resolutions violate Section 108(a) of PROMESA, and therefore are unenforceable and of no effect. (Id. ¶¶ 99, 105.) In Count VIII, the Oversight Board asserts that the Governor maintains a policy of not providing compliance certificates and seeks a declaration, pursuant to Sections 104(k), 204, and 108(a)(2) of PROMESA, that such policy is unlawful and prohibited. (Id. ¶ 111.)

The Court granted the *Joint Urgent Motion for a Modified Expedited Briefing Schedule* (Docket Entry No. 6) on July 7, 2019, thereby expediting the early stages of this adversary proceeding. Oral argument on the Motion was initially scheduled for August 2, 2019, and was thereafter twice adjourned in light of former Governor Rosselló's resignation and consequent changes in the Commonwealth's leadership.

II.

DISCUSSION

Defendants move pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6)[9] to dismiss the Oversight Board's Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. A court presented with motions to dismiss under both Rules 12(b)(1) and 12(b)(6) should ordinarily decide jurisdictional questions before addressing the merits. Deniz v. Municipality of Guaynabo, 285 F.3d 142, 149 (1st Cir. 2002). The party invoking the jurisdiction of a federal court carries the burden of proving the existence of proper grounds for the exercise of jurisdiction. Johansen v. United States, 506 F.3d 65, 68 (1st Cir. 2007). The Court also has an independent duty to assess whether it has subject matter jurisdiction of an action. See Fed. R. Civ. P. 12(h)(3); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990).

A. Rule 12(b)(1): Subject Matter Jurisdiction

Defendants contend that Count IV of the Complaint seeks a non-justiciable advisory opinion, and therefore move to dismiss Count IV (relating to alleged noncompliance with the budgetary reprogramming provisions of PROMESA Section 204(c)) pursuant to Federal Rule of Civil Procedure 12(b)(1). (See Mot. at 25-26.) Article III, Section 2 of the Constitution of the United States limits the exercise of federal judicial power to actual cases and controversies. U.S. Const. art. III, § 2; Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 239-41 (1937). The authority conferred on federal courts by the Declaratory Judgment Act, 28 U.S.C. § 2201, is likewise limited to controversies that are within the constitutionally-

[9] Rules 12(b)(1) and 12(b)(6) are applicable to this adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7012.

constrained scope of federal jurisdiction. Aetna, 300 U.S. at 240. A justiciable controversy must be "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Id. at 241. Federal courts are not empowered to issue advisory opinions where there is no such actual controversy. See id.; Golden v. Zwickler, 394 U.S. 103, 108 (1969); Shell Oil Co. v. Noel, 608 F.2d 208, 213 (1st Cir. 1979).

The constitutional requirement that controversies be justiciable and "admit[] of specific relief through a decree of a conclusive character" requires more than strong or even significant disagreement, however high the stakes, to obtain declaratory relief. Aetna, 300 U.S. at 241. The issue must be raised, and the relief sought, in a fashion that would address a specific live controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. See Golden, 394 U.S. at 108, 110. Rulings on isolated or abstract principles that will merely be useful in formulating or litigating future choices that might or might not be made are outside the authorized scope of declaratory relief.

Defendants argue that the declaration sought by the Oversight Board in Count IV (i.e., that Law 29 and the Joint Resolutions violate PROMESA Section 204(c) and are therefore unenforceable and of no effect) "would not actually remedy any harm allegedly stemming from what the [Oversight] Board believes to be unauthorized reprogramming of funds outside the certified budget." (Mot. at 25.) With respect to the Joint Resolutions, Defendants contend that, because the spending authorized by the Joint Resolutions has already occurred, Count IV would merely elicit an advisory opinion on what types of legislative actions might constitute reprogramming and thus only aid the parties in formulating future negotiating positions or litigating future legislative acts. (Id. at 26.) The Oversight Board argues that reprogramming for

Law 29 is "ongoing or otherwise imminent," and that Count IV therefore presents a live controversy insofar as it seeks a declaration regarding the enforceability and validity of Law 29. (Opp. at 19.) The Oversight Board also argues that the live controversy presented in Count IV with respect to the Joint Resolutions is whether the reprogramming effected by those Joint Resolutions violates Section 204(c) of PROMESA, not whether Section 204(c) of PROMESA has been violated upon a "hypothetical set of facts," and further notes that nothing in the record indicates that the spending contemplated by the Joint Resolutions has been completed. (Id. at 20.)

The Court finds that it has subject matter jurisdiction of the claim asserted in Count IV of the Complaint. As pleaded, the Count IV presents a specific live controversy as to whether Law 29 and the Joint Resolutions violate PROMESA Section 204(c) by providing for unauthorized reprogramming of funds in a manner inconsistent with the certified Budgets. Count IV alleges that Law 29 and the Joint Resolutions appropriate expenditures not included in the Budgets, and therefore reprogram funds in contravention of the Budgets. Section 204(c)(2) prohibits not only the adoption, but also the implementation of such unapproved measures. There is no evidence that the challenged measures have already been implemented completely. Accordingly, the Court finds that Count IV pleads a justiciable controversy, and Defendants' Motion is denied insofar as it seeks dismissal of Count IV pursuant to Federal Rule of Civil Procedure 12(b)(1).

B. Rule 12(b)(6): Failure to State a Claim

To survive a motion to dismiss for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6), a complaint must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S.

544, 570 (2007). The court accepts as true the non-conclusory factual allegations in the complaint and draws all reasonable inferences in the plaintiff's favor. Mississippi Pub. Emps.' Ret. Sys. v. Boston Scientific Corp., 523 F.3d 75, 85 (1st Cir. 2008). The court may consider "documents the authenticity of which are not disputed by the parties . . . [,] documents central to plaintiffs' claim[, and] documents sufficiently referred to in the complaint." Id. at 86 (internal citations and quotations omitted). The complaint must allege enough factual content to nudge a claim "across the line from conceivable to plausible." Ashcroft v. Iqbal, 556 U.S. 662, 680 (2009) (citing Twombly, 550 U.S. at 570).

As detailed in Section I, supra, the Oversight Board's claims focus on Law 29, certain Joint Resolutions, and foundational questions of whether, when, and to what extent PROMESA empowers the Oversight Board to challenge or thwart the implementation of legislative acts of the Commonwealth's government.

Section 204(a) of PROMESA, 48 U.S.C. § 2144(a), establishes a sequential process for the submission of legislative acts to the Oversight Board and related Oversight Board action under certain circumstances. Section 204(a)(1) generally requires the Governor to submit laws to the Oversight Board within seven business days of their enactment.[10] With each such submission, Section 204(a)(2) requires the Governor to provide the Oversight Board with documentation addressing two issues. The Governor must deliver a "formal estimate prepared

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[10] Section 204(a)(1) provides as follows:

> Except to the extent that the Oversight Board may provide otherwise in its bylaws, rules, and procedures, not later than 7 business days after a territorial government duly enacts any law during any fiscal year in which the Oversight Board is in operation, the Governor shall submit the law to the Oversight Board.

48 U.S.C.A. § 2144(a)(1) (West 2017).

by an appropriate entity of the territorial government with expertise in budgets and financial management of the impact, if any, that the law will have on expenditures and revenues." 48 U.S.C.A. § 2144(a)(2)(A) (West 2017). The Governor must also provide a certification by the "appropriate entity" that the submitted law "is not significantly inconsistent with the Fiscal Plan for the fiscal year," id. § 2144(a)(2)(B), or that the submitted law is "significantly inconsistent with the Fiscal Plan for the fiscal year," id. § 2144(a)(2)(C).

Pursuant to Section 204(a)(3),[11] the Oversight Board "shall send a notification to the Governor and the Legislature" if the Governor fails to submit an estimate, fails to submit a certification, or submits a certification that a law is significantly inconsistent with the fiscal plan. 48 U.S.C.A. § 2144(a)(3) (West 2017).

If the Governor fails to submit an estimate or certification, Section 204(a)(4)(A) provides the Oversight Board with authority to direct the Governor to supply the missing submission. See id. § 2144(a)(4)(A). If the Governor submits a certification that the law was significantly inconsistent with the governing fiscal plan, Section 204(a)(4)(B) provides the

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[11] Section 204(a)(3) provides, in full, that:

> The Oversight Board shall send a notification to the Governor and the Legislature if--
>
> (A) the Governor submits a law to the Oversight Board under this subsection that is not accompanied by the estimate required under paragraph (2)(A);
>
> (B) the Governor submits a law to the Oversight Board under this subsection that is not accompanied by either a certification described in paragraph (2)(B) or (2)(C); or
>
> (C) the Governor submits a law to the Oversight Board under this subsection that is accompanied by a certification described in paragraph (2)(C) that the law is significantly inconsistent with the Fiscal Plan.

48 U.S.C.A. § 2144(a)(3) (West 2017).

Oversight Board with authority to direct the territorial government to "correct the law to eliminate the inconsistency" or "provide an explanation for the inconsistency that the Oversight Board finds reasonable and appropriate." Id. § 2144(a)(4)(B) (West 2017).

If the territorial government fails to comply with the Oversight Board's direction pursuant to Section 204(a)(4), Section 204(a)(5) provides that "the Oversight Board may take such actions as it considers necessary, consistent with this chapter, to ensure that the enactment or enforcement of the law will not adversely affect the territorial government's compliance with the Fiscal Plan, including preventing the enforcement or application of the law." Id. § 2144(a)(5) (West 2017).

1. Count I: Section 204(a) of PROMESA

In Count I of the Complaint, the Oversight Board asserts that Law 29, including its enactment and enforcement, violates Section 204(a) of PROMESA and, accordingly, seeks an order declaring that (i) "the Governor has failed to comply with PROMESA § 204(a)(1);" (ii) the Oversight Board "has the authority under PROMESA § 204(a)(5) to prevent enforcement of a law to ensure the law will not adversely affect compliance with the Fiscal Plan;" and (iii) "due to Defendants' failures to properly certify Law 29, Defendants are enjoined from implementing and enforcing Law 29 and the law shall be deemed a nullity." (Compl. ¶¶ 56-61.) Defendants move to dismiss Count I on the merits in its entirety.

Defendants contend that Count I fails to state a claim upon which relief may be granted because, as alleged in the Complaint, Defendants followed the specific procedures contemplated by Section 204(a)(1) by submitting both an estimate of the fiscal effect of Law 29 and a certification that Law 29 is not "significantly inconsistent" with the 2019 Fiscal Plan. See 48 U.S.C. § 2144(a)(2)(A), (B). According to Defendants, a governor's certification of lack of

significant inconsistency, whether correct or not, insulates a newly enacted law from scrutiny or challenge by the Oversight Board. Defendants contend that Section 204(a) does not provide the Oversight Board with authority to review the sufficiency of Section 204(a) certifications or estimates but, rather, only authorizes the Oversight Board to send "notifications" in the three circumstances enumerated in Section 204(a)(3). None of those circumstances is presented here, as the Governor delivered both an estimate and a certification stating that Law 29 is not significantly inconsistent with the 2019 Fiscal Plan, and Defendants thus argue that the Oversight Board's assertions of the deficiency of the submissions and demands for corrections were unauthorized and ineffective. Absent Section 204(a) statutory predicates for such challenges, Defendants argue, the Oversight Board has no authority to seek remedies pursuant to Section 204(a)(5) based upon a failure to comply with the Oversight Board's direction. Defendants explicitly argue that delivery of any sort of estimate on official agency letterhead, no matter how conclusory or incomplete, with any documents labeled a certification and delivered by the Governor attesting that a piece of legislation has no significant impact on a fiscal plan, is effective to insulate the legislation from any challenge by the Oversight Board, whether or not the content of the documents is complete or plausible.

Defendants' position elevates form over substance and is unavailing under the circumstances pleaded in the Complaint. It is not consistent with the letter, spirit, or legislative context of the statutory provisions upon which Defendants rely. Section 204(a)(2)(A) requires a "formal estimate" covering revenue and expenditure effects of new legislation, and Section 204(a)(2)(B) provides for a finding of significant inconsistency with a fiscal plan as the trigger for inquiry and corrective action. It must be assumed in construing PROMESA, a statute that created the Oversight Board and fiscal plan structure as means of remedying long-standing

deficits and fiscal irregularities, that Congress expected the Governor and the relevant territorial entity to comply with the statutory predicates in good faith, and the statute does not expressly provide that the Governor's documentation is preclusive of inquiries as to its sufficiency or accuracy. Unlike the protection it afforded to Oversight Board certification decisions in Section 106(e) of PROMESA, Congress did not deprive the Court of jurisdiction to consider challenges to a certification by the Governor or a territorial agency. Nor, unlike many PROMESA provisions pertaining to Oversight Board actions, does Section 204(a) commit matters certified by the Governor to the Governor's sole discretion.[12] Congressional silence on the issue of incomplete or disingenuous purported compliance with Section 204(a)'s reporting and certification requirements is not properly construed as preclusive of a challenge to the completeness or accuracy of a certification especially where the statute provides that, when the Governor candidly admits to significant inconsistency but fails to make changes correcting or satisfactorily explaining the inconsistency, the Oversight Board is empowered to "take such actions as it considers necessary, consistent with [PROMESA], to ensure that the enactment or enforcement of the law will not adversely affect the territorial government's compliance with the Fiscal Plan, including preventing the enforcement or application of the law." 48 U.S.C.A. § 2144(a)(5) (West 2017). There is no logical basis for reading the statute as rewarding lack of candor by depriving the Oversight Board of the ability to address, with appropriate actions, an enactment that is in fact significantly inconsistent with a fiscal plan.

It is also noteworthy that Section 204(a)(6) of PROMESA authorizes the Oversight Board to provide the Legislature with preliminary reviews of proposed legislation and

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[12] Compare PROMESA Section 204, with PROMESA Sections 101(d), 104(i)(1), 107(b)(3), 201(a), 201(c)(1), 202(a), 202(c)(1), 203(d)(2), 206(a), 211, 316(a), and 317.

expressly provides that "any such preliminary review shall not be binding on the Oversight Board in reviewing any law subsequently submitted under this subsection." 48 U.S.C.A. § 2144(a)(6) (West 2017). That language indicates that the Oversight Board has a role in the Section 204(a) legislative review process that is more substantial than merely accepting certifications and estimates provided by the Governor. It would be anomalous indeed if Congress intended to empower a governor to strip the Oversight Board entirely of power to ensure that enactment or enforcement of a law will not adversely affect fiscal plan compliance by the simple expedient of delivery of incomplete, inaccurate, or false documentation. Consistency with the overall purpose and statutory language of PROMESA instead demands recognition of the Oversight Board's ability to question and, if necessary, bring before the Court challenges to the sufficiency and accuracy of documents as important as revenue estimates and certifications regarding significant inconsistencies with fiscal plans. Congress's general provision in PROMESA Section 104(k) authorizing the Oversight Board to seek judicial enforcement of its authority to carry out its responsibilities under PROMESA further confirms that the Oversight Board's ability to initiate litigation of issues regarding noncompliance by government entities is not limited to the specific measures enumerated in a particular provision of the statute.

Here, the Oversight Board has pleaded facts showing that the inconsistency between Law 29 and the certified 2019 Fiscal Plan runs from the hundreds of millions of dollars to almost $2 billion over the relevant time period. Section 204(a)(2) requires submission of a "formal" estimate and a certification of compliance; Defendants have submitted a document—the Certificate—that purports to be an estimate and a certification of compliance, but the Complaint plausibly pleads that the document does not meet the requirements of Section 204(a)(2). Among other things, the Complaint notes that the Certificate does not purport to

estimate the impact of Law 29's PayGo provisions beyond fiscal year 2020, notwithstanding that the 2019 Fiscal Plan encompasses five years of Commonwealth finances. (Compl., Ex. 12 at 2 ("As for the 'Pay as you Go' system, [Law 29] has an impact of approximately $166 million for Fiscal Year 2020. An actuarial study has been requested to determine the impact on expenditures for subsequent fiscal years.").) In the absence of information concerning the fiscal effect of that aspect of Law 29, the Oversight Board's contention that it properly invoked Section 204(a)(3)(A) and (B) and Section 204(a)(4)(A) of PROMESA to direct the Governor to supplement the formal estimate and submit an amended certificate consistent with that estimate has a plausible factual basis. The Governor's alleged failure to comply with those directions similarly provides the Oversight Board with a plausible factual basis for assertion of authority pursuant to Section 204(a)(5) to ensure that the legislation is consistent with the 2019 Fiscal Plan. Indeed, the Certificate itself included factual information objectively indicating that both the PayGo and health insurance provisions of Law 29 will have a significant fiscal impact, totaling approximately $932 million without accounting for the PayGo expenditures for fiscal year 2021 to 2024, but Defendants nonetheless conclusorily certified that Law 29 "is not significantly inconsistent with the New Fiscal Plan for Puerto Rico." (Compl., Ex. 12 at 2.)

Furthermore, the Oversight Board has also challenged plausibly Defendants' assertion that a compliance certification under Section 204(a)(2) need only attest to compliance with a single year of a fiscal plan. (See Reply at 6-7 ("[T]he language of PROMESA section 204(a)(2)(B)–(C) . . . specifies that the estimate only needs to be sufficient to determine compliance with 'the Fiscal Plan for the *fiscal year*.'").) In context, the phrase "Fiscal Plan for the fiscal year" may reasonably be read to refer to the operative Fiscal Plan (here, the 2019 Fiscal Plan), which encompasses five years. Such a reading is consistent with Section 204(a)(5), which

provides the Oversight Board with authority to take action to ensure that enactment or enforcement of laws will not adversely affect compliance with the fiscal plan.

At this early stage of the litigation, the Court finds that the Oversight Board has pleaded plausibly its claim of non-compliance with Section 204(a) of PROMESA, and that Defendants have not established as a matter of law that the Oversight Board is precluded from challenging the substance and significance of the Governor's submissions under PROMESA Section 204(a) and the propriety of Law 29. The Motion is therefore denied insofar as it seeks dismissal of Count I.

2. Count II: Section 207 of PROMESA

Section 207 of PROMESA, entitled "Oversight Board authority related to debt issuance," provides that, "[f]or so long as the Oversight Board remains in operation, no territorial government may, without the prior approval of the Oversight Board, issue debt or guarantee, exchange, modify, repurchase, redeem, or enter into similar transactions with respect to its debt." 48 U.S.C.A. § 2147 (West 2017).

In Count II of the Complaint, the Oversight Board asserts that Law 29, including its enactment and enforcement, violates Section 207 of PROMESA and, accordingly, seeks an order pursuant to Sections 104(k) and 207 of PROMESA declaring that "Law 29 is unenforceable and of no effect, and that due to Defendants' violation of PROMESA § 207, Defendants are enjoined from implementing and enforcing Law 29 and the law shall be deemed a nullity." (Compl. ¶¶ 62-65.) Defendants move to dismiss Count II on the merits in its entirety.

Defendants argue that Plaintiff cannot challenge actions of the Commonwealth's Legislature under Section 207, asserting that Section 204 of PROMESA "provides the only mechanism by which the [Oversight Board] is authorized to review legislation." (Mot. at 20.)

Additionally, Defendants contend that Section 207 is facially inapplicable to the review and nullification of legislative action, and that Section 207 pertains only to financial debt issuances and guarantees and modifications of the terms of such debt incurred in the capital markets. (Id.) Because Law 29 "is legislation that ends municipalities' obligations to remit future PayGo fees to the Commonwealth, which is not a 'debt' under any reasonable interpretation of the term," Defendants argue, Law 29 is not a "debt issuance" subject to the limitations set forth in Section 207 of PROMESA, and Count II of the Complaint should therefore be dismissed. (Id. at 20-21.)

In opposition, the Oversight Board asserts that Section 207, like all of PROMESA, is intended to address control and restructuring of the Commonwealth's broad range of significant debt, which includes pension-related debt, and that Defendants' reading of Section 207 as restricted to issuances of debt on the capital markets is too narrow. (Opp. 24-25.) The Oversight Board contends that Law 29 illegally modified the debt of the Commonwealth by releasing municipalities from their PayGo reimbursement responsibilities, thereby converting the Commonwealth's backstop guaranty of pension payments into a primary obligation by eliminating the Commonwealth's right to reimbursement. (Id. at 23.) Law 29 modified over a billion dollars of both Commonwealth and municipal debt without Oversight Board approval and is therefore, the Oversight Board argues, subject to challenge pursuant to Section 207 of PROMESA. (Id. at 27.)

On the basis of the record and arguments proffered at this early stage of these expedited proceedings, the Court finds that Count II states a claim upon which relief may be granted. While it is arguable that Section 207's approval requirement for new debt undertakings may apply only to debt incurred in the capital markets through "issuance" transactions, the statute's provisions requiring approval of guarantees and modifications refer more generally to

the Commonwealth's "debt," without a modifier restricting such debt to that incurred in market-based transactions. Here, the Complaint and exhibits thereto demonstrate that Law 29 severed from the Commonwealth's original undertaking to pay municipal pensions the obligation of municipalities to repay the pension outlays, thus modifying the Commonwealth's outstanding debt obligation to retirees by making the Commonwealth the sole relevant obligor. According to the Complaint, the impact of this debt modification exceeds a billion dollars. The Court concludes that these facts are sufficient to state a claim that Law 29 effectuated an unapproved modification of the Commonwealth's prior debt or guaranty obligation to pensioners under Act 106. Defendants' Motion is therefore denied with respect to Count II of the Complaint.

3. Counts III and V: Requests for Injunctive Relief

In Count III, the Oversight Board seeks a "mandatory permanent injunction prohibiting Defendants from implementing and enforcing Law 29." (Compl. ¶¶ 66-76.) The Oversight Board also seeks, in Count V, a "mandatory permanent injunction compelling the Governor to submit compliant § 204(a) certifications for the New Laws and Non-Certified Joint Resolutions." (Id. ¶¶ 82-91.) Defendants have moved to dismiss Counts III and V on the merits in their entirety.

Defendants argue that Count III should be dismissed because (i) the Oversight Board may enjoin legislation under only the narrow circumstances provided in Section 204(a)(5) of PROMESA, which Defendants argue do not apply here, (ii) an injunction is a remedy rather than an independent claim, and (iii) the permanent injunction sought by the Oversight Board is "overbroad" in that it would prevent the Commonwealth from enacting Law 29 or other similar laws in the future without regard to changing circumstances. (Mot. at 22-23.) Similarly, Defendants contend that Count V should be dismissed because PROMESA does not provide for

a mandatory permanent injunction as a remedy under Section 204(a), and because an injunction is a remedy rather than an independent claim. (Id. at 28.) Defendants assert that, if the Governor's failure to provide a certification gives rise to circumstances that warrant and allow action by the Oversight Board under PROMESA Section 204(a)(5), the Oversight Board should instead exercise its explicit powers under Section 204(a)(5). (Id. at 28-29.)

The Oversight Board argues that "Count III is a claim for breach of a statute that seeks a permanent injunction *based on* Defendants' clear violation of PROMESA § 204," which authorizes the Oversight Board "to ensure" that "enactment or enforcement of the law will not adversely affect . . . compliance with the Fiscal Plan, including preventing the enforcement or application of the law" (Section 204(a)(5)), and also provides that the legislature "shall not adopt" and no territorial officer may "carry out" any reprogramming that has not been certified by the Oversight Board (Section 204(c)(2)). (Opp. at 42 (emphasis in original); see also Hr'g Tr., Docket Entry No. 65 at 51:9-25.) Thus, the Oversight Board contends that Count III presents an independent claim rather than merely a demand for a remedy. The Oversight Board also argues that the relief sought in Count III is not overbroad because, if the surrounding circumstances were to change, the Court could simply modify its order. (Opp. at 43.) With respect to Count V, the Oversight Board likewise argues that Section 204(a)(5) of PROMESA does, in fact, expressly authorize the Oversight Board to take action that it considers necessary, "including preventing the enforcement or application of [a] law." (Id. at 44-45.)

The Court finds that Counts III and V state claims upon which relief may be granted. Counts III and V specifically invoke Section 204(a)(5) of PROMESA; Count III asserts that Section 204(a)(5) "provides for the prevention of the application and enforcement of a law when the government fails to comply with the Oversight Board's directions in respect of a

missing estimate or certification provided by the government, which directions can invoke procedures the Oversight Board establishes," and Count V asserts that Section 204(a)(5) "empowers the Oversight Board to take such actions as it considers necessary, consistent with PROMESA, to ensure that the enactment or enforcement of [the] new law will not adversely affect the territorial government's compliance with the Fiscal Plan." (Compl. ¶¶ 72, 88 (internal quotations omitted).) Both Counts III and V incorporate the Complaint's factual assertions concerning noncompliance with the relevant statute. In addition, Count III invokes Section 204(c)(2) by alleging that the Oversight Board has not issued the required Section 204(c) certification permitting the reprogramming required to effectuate Law 29, and certain of the other preceding allegations of the Complaint incorporated into Counts III and V seek relief under Section 204 of PROMESA. (Compl. ¶ 73.) Counts III and V therefore state a claim for injunctive relief to ensure that the enactment and enforcement of Law 29 and the Joint Resolutions will not adversely affect compliance with the 2019 Fiscal Plan, and the Court denies Defendants' Motion with respect to Counts III and V.

4. Count IV: Section 204(c) of PROMESA

PROMESA Section 204(c)(2) provides that the "Legislature shall not adopt a reprogramming, and no officer or employee of the territorial government may carry out any reprogramming, until the Oversight Board has provided the Legislature with an analysis that certifies such reprogramming will not be inconsistent with the Fiscal Plan and Budget." 48 U.S.C.A. § 2144(c)(2) (West 2017).

The Oversight Board asserts, in Count IV of the Complaint, that Law 29 and the Joint Resolutions, including their enactment and enforcement, violate PROMESA Section 204(c). (Compl. ¶¶ 77-81.) The Oversight Board accordingly seeks an order declaring that

"Law 29 and the Joint Resolutions are unenforceable and of no effect." (Id. ¶ 81.) As explained above, Defendants have moved for dismissal of Count IV both as seeking an impermissible advisory opinion and on the merits. Having found in Section II.A, supra, that Count IV presents a justiciable issue, the Court now turns to Defendants' merits arguments.

Defendants first argue that Section 204(c) of PROMESA does not grant the Oversight Board the power to nullify legislation that has already been enacted, but instead applies only to requests from the Governor to the Legislature to reprogram amounts in a certified budget before legislation has been passed. (Mot. at 24.) Defendants also argue that Section 204(c) implicates only the conduct of the Legislature and any territorial officer or employee who carries out a reprogramming, and that the Governor and AAFAF are not proper defendants in relation to Count IV given that neither the Governor nor AAFAF is alleged to have carried out any unauthorized reprogramming in violation of Section 204(c) of PROMESA. (Id. at 24-25.) Defendants further assert that Law 29 does not reprogram funds at all, but instead "simply excuses municipalities from contributing to the Government health plan and PayGo system," and that the Joint Resolutions, although admittedly involving reprogramming, do not reprogram funds "in a certified Budget" as required by Section 204(c). (Id. at 26-27.) Specifically, Defendants argue that certain of the Joint Resolutions apportion funds from the Municipal Improvement Fund ("MIF"), which do not run through the Commonwealth Budgets and for which no certified budget existed, and that those particular Joint Resolutions therefore reprogram funds that are not subject to Section 204(c). (Reply at 16.)

The Oversight Board argues that PROMESA Section 204(c) prohibits all reprogramming absent certification from the Oversight Board confirming that the reprogramming is not inconsistent with the certified fiscal plan and budget, and that both Law 29

and the Joint Resolutions reprogram funds without Oversight Board approval in violation of Section 204(c). (Opp. at 15.) The Oversight Board also asserts that Section 204(c) applies not only to prospective legislation but also to any legislation that requires reprogramming, whether already enacted or not, and irrespective of whether a request has been made of the Oversight Board under Section 204(c)(1) of PROMESA. (Id. at 16-17.) With respect to Defendants' argument that Section 204(c) does not apply to the Joint Resolutions because the resolutions do not reallocate funds from prior fiscal years, the Oversight Board cites the Court's decision in Rosselló Nevares v. The Fin. Oversight & Mgmt. Bd. for P.R. (In re The Fin. Oversight & Mgmt. Bd. for P.R.), 330 F. Supp. 3d 685 (D.P.R. 2018) (the "Rosselló Opinion"), arguing that "prior year authorizations not congruent with the active budget are inconsistent with PROMESA, and are preempted as a matter of law." (Opp. at 18 (citing In re The Fin. Oversight & Mgmt. Bd. for P.R., 330 F. Supp. 3d at 704).)

Defendants' argument that Section 204(c) is inapplicable after the enactment of reprogramming legislation is unavailing. Section 204(c)(2) incorporates no temporal limitations; it prohibits both the adoption and the carrying out of unapproved reprogramming legislation. Defendants' arguments that excusing municipalities from making payments does not constitute reprogramming, and that Section 204(c) is inapplicable to the extent that funds are purportedly taken from sources not covered by the certified Budgets, are equally unavailing. Act 106, the 2019 Fiscal Plan, and the certified Budgets all contemplate the receipt of revenues from the municipalities. Absent those revenues, funds otherwise committed to other purposes by the Budgets will necessarily have to be redirected. Law 29 obviously contemplates reprogramming. As to supposedly off-budget sources, the Court's previous determination regarding the scope of an approved budget rejects Defendants' premise:

> It beggars reason, and would run contrary to the reliability and transparency mandates of PROMESA, to suppose that a budget for a fiscal year could be designed to do anything less than comprehend all projected revenues and financial resources, and all expenditures, for the fiscal year. Since a certified budget is in full effect as of the first day of the covered period, means and sources of government spending are necessarily rendered unavailable if they are not provided for within the budget. A prior year authorization for spending that is not covered by the budget is inconsistent with PROMESA's declaration that the Oversight Board-certified budget for the fiscal year is in full force and effect, and is therefore preempted by that statutory provision by force of Section 4 of PROMESA.

In re The Fin. Oversight & Mgmt. Bd. for P.R., 330 F. Supp. 3d at 704.

For the foregoing reasons, the Court finds that the Oversight Board has, in Count IV, stated a claim to relief that is plausible on its face. Defendants' Motion to dismiss Count IV of the Complaint is therefore denied.

5. Counts VI and VII: Section 108 of PROMESA

Section 108(a) of PROMESA provides that "[n]either the Governor nor the Legislature may (1) exercise any control, supervision, oversight, or review over the Oversight Board or its activities; or (2) enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of [PROMESA], as determined by the Oversight Board." 48 U.S.C.A. § 2128(a) (West 2017).

In Count VI, the Oversight Board asserts that Law 29 violates PROMESA Section 108(a) and is unenforceable and of no effect because it impairs and/or defeats the purposes of PROMESA, as determined by the Oversight Board, and, accordingly, seeks an order declaring that, "[p]ursuant to each of §§ 204 and 108(a)(2) of PROMESA . . . Law 29 is not enforceable

and is of no effect." (Compl. ¶¶ 92-99.)[13] In Count VII, the Oversight Board similarly asserts that the Joint Resolutions violate PROMESA Section 108(a) because they impair and/or defeat the purposes of PROMESA, as determined by the Oversight Board, and, accordingly, seeks an order declaring that, "[p]ursuant to PROMESA §§ 104(k), 204, and 108(a)(2), . . . the Joint Resolutions are not enforceable and are of no effect." (Id. ¶¶ 100-105.)

Defendants contend that both Counts VI and VII must be dismissed under the law of the case doctrine because the Court has already rejected the Oversight Board's legal theories related to Section 108 of PROMESA. (Mot. at 29.) Specifically, Defendants argue that both the Rosselló Opinion and In re The Fin. Oversight & Mgmt. Bd. for P.R., 583 B.R. 626 (D.P.R. 2017) (the "CTO Opinion") preclude the Oversight Board's attempt to "determine, in its own sole discretion, whether any law or resolution unduly interferes with the Board's desires and, if so, to declare the [Legislature's] acts null and void by [Oversight Board] fiat." (Mot. at 29.) Defendants rely on selective quotations of portions of the CTO Opinion in which this Court stated (i) that "Section 108(a) serves as a restraint on territorial officials, but it does not provide an affirmative grant of authority to the [Oversight Board] to take any and all actions it believes are necessary to further its role under PROMESA," and (ii) that Section 108(a) merely "preserves the autonomy of the [Oversight Board] by prohibiting the Governor and Legislature from *exercising control* over the [Oversight Board]." (Id. at 30 (citing In re The Fin. Oversight

[13] The Oversight Board does not explicitly invoke Section 104(k) of PROMESA, which allows the Oversight Board to seek judicial enforcement of its authority to carry out its statutory responsibilities, as a basis for relief in Count VI. (Compare Count VI (seeking relief pursuant to "§§ 204 and 108(a)(2) of PROMESA"), with Count VII (seeking relief pursuant to "§§ **104(k)**, 204, and 108(a)(2)") (emphasis added).) However, the Oversight Board generally invokes the authority provided in Section 104(k) in Paragraph 5 of the Complaint. The Court construes Paragraph 5 of the Complaint as invoking Section 104(k) with respect to all of the Oversight Board's claims for relief.

& Mgmt. Bd. for P.R., 583 B.R. at 634).) Defendants cite language from the Rosselló Opinion confirming that "Section 108(a)(2) of PROMESA prohibits the Governor and Legislature from exercising any supervision or control over the Oversight Board or its activities." (Id. (citing In re The Fin. Oversight & Mgmt. Bd. for P.R., 330 F. Supp. 3d at 700).) Defendants also argue that the Oversight Board is collaterally estopped from relitigating any of its Section 108(a)-related arguments. (Id. at 32, n.19.)

The Oversight Board argues that both Law 29 and the Joint Resolutions impair and defeat the purposes of PROMESA in violation of PROMESA Section 108(a), that Defendants misstate the Court's rulings in the CTO Opinion and the Rosselló Opinion, and that the plain language of Section 108(a) allows the Oversight Board to challenge Law 29 and the Joint Resolutions as contrary to the purposes of PROMESA. (See Opp. at 27-31.)

The Oversight Board pleads in the Complaint that it "has determined that Law 29, if implemented and enforced by the Governor and/or AAFAF, would impair or defeat the purposes of PROMESA" by depriving the Commonwealth of hundreds of millions of dollars and thereby diminishing market access, allowing municipalities to avoid paying for their own retired employees and thereby defeating fiscal responsibility, and diminishing the Commonwealth's ability to invest in projects creating economic growth. (Compl. ¶ 96 (internal citations omitted).) The Oversight Board further pleads that it has determined that the Joint Resolutions impair or defeat the purposes of PROMESA by overriding the Oversight Board's statutory power over the budget. (Compl. ¶¶ 100-05.) These determinations suffice to supply a predicate for seeking relief under Section 108(a)(2) and, accordingly, the Oversight Board may challenge the "enact[ment], implement[ation], or enforce[ment]" of Law 29 and the Joint Resolutions as violative of Section 108(a) of PROMESA.

Defendants' citations to the Rosselló and CTO Opinions are incomplete at best, and misleading at worst. In the CTO Opinion, the Court denied the Oversight Board's motion to install a Chief Transformation Officer ("CTO") for the Puerto Rico Electric Power Authority ("PREPA") after considering the issue of "whether PROMESA grants the [Oversight Board] authority to unilaterally displace a statutorily-created management structure and direct the executive functions of a Title III debtor." In re The Fin. Oversight & Mgmt. Bd. for P.R., 583 B.R. at 630. The Court held that "Section 108(a) serves as a restraint on territorial officials, but it does not provide an affirmative grant of authority to the [Oversight Board] to take any and all actions it believes are necessary to further its role under PROMESA." Id. at 634. Here, the Oversight Board does not seek to create a new position, displace a pre-existing management structure, disrupt the present operations of a debtor or an instrumentality, or control the executive functions of the Commonwealth. It instead seeks to prevent the implementation of Law 29 and the Joint Resolutions, after having determined that the implementation of the statute and resolutions would impair or defeat the purposes of PROMESA. The Oversight Board's determinations regarding the alleged impairment that Law 29 and the Joint Resolutions would effectuate rise to a level warranting this Court's review under any objective standard of reasonableness, and the authority that the Oversight Board presently seeks to exercise is therefore well within the contemplation of Section 108(a)(2) of PROMESA.

Because the Oversight Board has alleged sufficiently that both Law 29 and the Joint Resolutions impair and defeat the purposes of PROMESA, Counts VI and VII state claims upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). The Motion is therefore denied insofar as it seeks the dismissal of Counts VI and VII.

6. Count VIII: Challenge to the Governor's Alleged Policy

In Count VIII, the Oversight Board asserts that the Governor's "policy of not providing certifications as required under PROMESA § 204" violates PROMESA Section 108(a) because such policy impairs and/or defeats the purposes of PROMESA, as determined by the Oversight Board. (Compl. ¶¶ 106-111.) The Oversight Board therefore seeks an order declaring that, "[p]ursuant to PROMESA §§ 104(k), 204, and 108(a)(2), . . . the Governor's policy of not providing compliance certificates is unlawful and prohibited." (Id. ¶ 111.)

Defendants argue that the Oversight Board fails to allege plausibly a "'policy' of not providing the statutorily-mandated compliance certificates," and instead offer what Defendants characterize as a "far more plausible conclusion" to be drawn from the Governor's submission of late or incomplete certificates: "the Governor, AAFAF, and the other elected Government entities . . . simply have difficulty at times complying with PROMESA's draconian requirement that they submit estimates and certifications for every law that the Legislature passes within seven days of enactment." (Mot. at 32-33.) Defendants also argue that there is no actual case or controversy with respect to Count VIII. (Id. at 33.) The Oversight Board contends that Defendants' repeated violations of Section 204(a)'s certification requirements and Section 204(c)'s limitations on reprogramming obstruct the Oversight Board's ability to perform effectively its duty of restoring fiscal responsibility to the Commonwealth, which impairs and defeats the purposes of PROMESA. (Opp. at 15.)

The Court concludes that the Oversight Board has pleaded facts sufficient to support the existence of an ongoing practice of refusal by the Governor to comply with the requirements of Section 204 of PROMESA sufficient to survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The Oversight Board plausibly asserts that the

Governor, prior to the initiation of this adversary proceeding, repeatedly, knowingly, and deliberately failed to comply with the certification requirements set forth in Section 204(a), as well as the reprogramming limitations set forth in Section 204(c). The Governor has final policymaking authority for certification decisions and reprogramming requests pursuant to the terms of PROMESA, and the Governor's alleged actions constitute the policy of the Commonwealth. Cf. Rodriguez v. Municipality of San Juan, 659 F.3d 168 (1st Cir. 2011) (holding that a policy or custom may be established in a Section 1983 action by demonstrating that a person with final policymaking authority (i.e., a former mayor of San Juan) caused the alleged constitutional injury). Sections 104(k), 108, and 204 of PROMESA together provide a sufficient predicate for declaratory relief seeking to compel the Governor to comply with the clear mandates of PROMESA. The Motion is therefore denied with respect to Count VIII of the Complaint.[14]

III.

CONCLUSION

For the foregoing reasons, the motion to dismiss the Complaint is denied in all respects. This adversary proceeding remains referred to Magistrate Judge Dein for general

[14] The Court recognizes that the Commonwealth now has a new Governor. Its determination that the Complaint states a claim based on allegations regarding the actions of the former Governor is not preclusive of the development of a record and further determinations as to whether the alleged policy actually exists or continues to exist.

pretrial management.

This Opinion and Order resolves Docket Entry No. 17.

SO ORDERED.

Dated: August 22, 2019

/s/ Laura Taylor Swain
LAURA TAYLOR SWAIN
United States District Judge